

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CAMERON PIERCE and PATRICIA
PIERCE, husband and wife; KAREN KIRBY,
a single woman; MARY J. RAY, a single
woman, GREGORY SHERMAN and
PAULA SHERMAN, husband and wife,
MICHAEL LEPAGE and GERTRUDE
LEPAGE, husband and wife; on behalf of
themselves and a class of similarly situated
individuals,

Plaintiffs,

v.

NOVASTAR MORTGAGE, INC., a foreign
corporation,

Defendant.

CASE NO. C05-5835RJB

ORDER AMENDING CLASS
DEFINITION AND APPOINTING
CLASS COUNSEL

This matter comes before the Court on Defendant NovaStar Mortgage Inc.'s
Memorandum of Law Regarding Class Definition (Dkt. 76) and Plaintiffs' Supplemental
Submission Regarding the Court's Order Granting Plaintiffs' Renewed Motion for Class
Certification (Dkt. 77). The Court has considered the pleadings filed in support of and in
opposition to the filings and the file herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts and procedural posture of this case were set forth in the Court's Order on the
plaintiffs' first motion for class certification and need not be fully restated here. *See* Dkt. 60. The
plaintiffs are all borrowers who engaged in loan transactions with defendant NovaStar and claim

1 to have been deceived by NovaStar's failure to disclose its payment of broker fees known as
2 "yield spread premiums" ("YSP"). The plaintiffs brought suit alleging that the failure to provide
3 written disclosure of the YSPs charged on their loans violated Washington's Consumer Protection
4 Act, 19.86 *et seq.*

5 The plaintiffs moved to certify a class of borrowers who were not provided written
6 disclosures. Dkt. 25. The Court denied the motion without prejudice. Dkt. 60. As invited by the
7 Court, the plaintiffs again moved to certify a class. Dkt. 61. The Court heard oral argument on the
8 motion and certified a class as follows:

9 [A]n opt-out class that includes every borrower satisfying the following requirements:

10 (1) the borrower entered into a federally-regulated mortgage loan that was subject
11 to the requirements of the Real Estate Settlement Procedures Act, 12 U.S.C.
12 §2601 *et seq.* ("RESPA") and secured by property within the State of Washington,
at any time from July 30, 1999, to the present;

13 (2) in connection with the transaction, NovaStar paid a yield spread premium
14 ("YSP") to the borrower's mortgage broker;

15 (3) in connection with the transaction, neither NovaStar nor the broker disclosed
16 to the borrower the YSP on a good faith estimate dated within three days of the
17 date on which NovaStar received the loan application; and

18 (4) in connection with the transaction, the borrower paid the mortgage broker
19 compensation in addition to the YSP that NovaStar paid to the broker.

20 Dkt. 74 at 11. The Court allowed the parties to propose amendments to the class definition to
21 determine whether borrowers with real property located outside of the Western District of
22 Washington should be excluded, whether the filing of *Tandiana v. Novastar Mortgage*, No.
23 03-0909 (W.D.Wash. 2005), tolled the statute of limitations as to this case, whether a subclass
24 should be certified, and any remaining issues. *Id.* at 10-11. Both parties have proposed
25 amendments to the class definition.

26 II. DISCUSSION

27 A. PROPERTY LOCATED OUTSIDE THE WESTERN DISTRICT

28 In the Order Granting Plaintiffs' Renewed Motion for Class Certification, the Court
invited the parties to address whether the class definition raised personal jurisdiction concerns

1 because it did not exclude loans involving real property located outside of the Western District of
2 Washington. Dkt. 74 at 10-11. The plaintiffs contend that the inclusion of such loans does not
3 defeat the Court's personal jurisdiction. NovaStar does not address this aspect of the class
4 definition.

5 Plaintiffs may consent to jurisdiction, and "opt out" procedures are generally a valid
6 method of obtaining such consent. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812
7 (1985); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992 (applying *Phillips*
8 *Petroleum* to federal court actions.)). Whether the opt out procedure ultimately utilized by
9 plaintiffs' counsel will be sufficient to bind class members over which the Court would not
10 otherwise have personal jurisdiction is an issue not now before the Court. The definition of the
11 class should not be modified to exclude loans pertaining to real property outside of the Western
12 District of Washington.

13 **B. TOLLING OF THE STATUTE OF LIMITATIONS**

14 In the Order Denying Plaintiffs' Motion for Class Certification, the Court declined to rule
15 whether the filing of *Tandiana* tolled the statute of limitations as to this case because the motion
16 was decided on other grounds. Dkt. 60. In the Order on the Plaintiffs' Renewed Motion for Class
17 Certification, the Court allowed the parties to propose, by subsequent motion, narrowing of the
18 class on statute of limitations ground. Dkt. 74. The plaintiffs proposed that the class include loans
19 entered into from July 30, 1999, to the present on the theory that the statute of limitations was
20 tolled by the filing of the amended complaint in *Tandiana*. This date is premised upon the
21 contention that the statute of limitations remained tolled after the motion to certify a class in
22 *Tandiana* was denied on November 23, 2004, after the case was dismissed on November 8,
23 2005, and until this case was filed on December 30, 2005. Recognizing that tolling applies only
24 until the motion to certify in the previous case was denied, if at all, the plaintiffs now contend that
25 the class definition should be changed to include loans entered into beginning September 4, 2000.
26 Dkt. 79. This date would account for the lapse of time between the denial of class certification in
27 *Tandiana* and the filing of the complaint in this case. *Id.*

1 Absent a clear indication that the filing of an attempted class action lawsuit tolls later suits
2 seeking class certification in the Ninth Circuit, the Court should hold that this case was not tolled
3 by the filing of *Tandiana*. The class definition should be amended to include only loans entered
4 into on or after December 30, 2001, four years before the complaint was filed in this case.

5 **C. SUBCLASS**

6 As currently defined, the class does not explicitly exclude secondary market transactions.
7 The plaintiffs have invited the Court to certify a subclass to accommodate secondary market
8 transactions or to leave the definition unchanged. NovaStar proposes no amendments in this
9 regard. Having held that the determination of whether loans fall outside the scope of the class on
10 the grounds that they constitute secondary market transactions does not defeat certification of a
11 class, the Court should decline to certify a subclass or to modify the definition of the class with
12 respect to secondary market transactions.

13 **D. TIMING OF DISCLOSURES**

14 As currently defined, the class includes loan transactions in which “neither NovaStar nor
15 the broker disclosed to the borrower the YSP on a good faith estimate dated within three days of
16 the date on which NovaStar received the loan application.” Dkt. 74 at 11. NovaStar contests this
17 portion of the definition on two grounds:

18 First, NovaStar contends that NovaStar may rely upon brokers’ disclosures of yield spread
19 premiums on good faith estimates and that such estimates need not be dated within three days of
20 *NovaStar’s* receipt of the loan application. Second, Novastar contends that RESPA allows for
21 disclosures by the lender within three days of receiving the loan application or at consummation of
22 the loan, whichever is earlier. The plaintiffs agree with these contentions and propose changes to
23 the definition that address these concerns. These proposed amendments should be adopted.

E. ADEQUACY OF DISCLOSURES

At oral argument, the Court inquired as to whether the plaintiffs intended to argue solely that NovaStar failed to disclose the YSP on good faith estimates altogether or whether the plaintiffs also claimed that the disclosures were sometimes present but inadequate. The plaintiffs make both claims and agree that changing “broker disclosed” to “broker adequately disclosed” would be proper. Dkt. 77 at 5. While NovaStar contends that this minor addition is unnecessary, the Court should amend the definition to account for disclosures that were provided within the requisite time period but were allegedly deficient in substance or in form. *See* Dkt. 78 at 2 (NovaStar’s response).

F. APPOINTMENT OF CLASS COUNSEL

The plaintiffs request that the Court appoint plaintiffs’ counsel as class counsel. Dkt. 77 at 5. NovaStar does not object, and the Court has previously held that plaintiffs’ counsel appear able and willing to prosecute vigorously on behalf of the class. Dkt. 60 at 11. The Court should therefore appoint plaintiffs’ counsel as class counsel.

III. ORDER

Therefore, it is hereby

ORDERED that counsel of record for the class plaintiffs are appointed as class counsel and the definition of the class is **AMENDED** to read as follows:

An opt-out class that includes every borrower satisfying the following requirements:

(1) the borrower entered into a federally-regulated mortgage loan that was subject to the requirements of the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 et seq. (“RESPA”) and secured by property within the State of Washington, at any time from December 30, 2001, to the present;

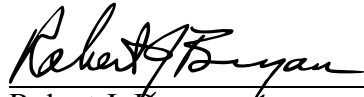
(2) in connection with the transaction, NovaStar paid a yield spread premium (“YSP”) to the borrower’s mortgage broker;

(3) in connection with the transaction, neither NovaStar nor the broker adequately disclosed to the borrower the YSP on a good faith estimate dated no later than three days after the date on which NovaStar received the loan application or, in the case of a loan application received fewer than three days before the borrower signed final loan documents, the date on which the borrower signed final loan documents; and

1 (4) in connection with the transaction, the borrower paid the mortgage broker
2 compensation in addition to the YSP that NovaStar paid to the broker.

3 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
4 of record and to any party appearing *pro se* at said party's last known address.

5 DATED this 14th day of November, 2006

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8 Robert J. Bryan
9 United States District Judge
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